

No. ~~05-513~~ OCT 14 2005

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In The
Supreme Court of the United States

DARCY C.K. FREITAS,

Petitioner,

v.

ADMINISTRATIVE DIRECTOR OF THE COURTS,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Hawaii**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, a party's due process right to a public hearing in a contested administrative case is infringed when the state agency, in lieu of standard security screening, restricts access to persons who show identification and sign a roster open to the public and maintained by the agency for use at its own discretion?

Whether the routine restrictions set out above are, as a matter of law, the least restrictive means to achieve the agency's interest in security?

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OPINION BELOW

The published opinion of the Supreme Court of Hawaii is *Freitas v. Administrative Director*, 108 Haw. 31, 116 P.3d 673 (2005) (*Freitas II*). The hearing officer's findings are quoted in the opinion. 108 Haw. at 34, 116 P.3d at 676.

JURISDICTION

The Supreme Court of Hawaii filed its decision on July 25, 2005. This Court has jurisdiction under 28 U.S.C. §1257(a) to review the decision of the Supreme Court of Hawaii on a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Petitioner Darcy C.K. Freitas (Freitas) was arrested in 2004 for driving under the influence of alcohol in violation of Haw.Rev.Stat. §291E-61(a)(1) & (a)(3) (2003 Supp.). As a result of his arrest, his Hawaii driver's license was revoked by the Administrative Driver's License Revocation Office (ADLRO).¹ Freitas requested an administrative hearing to challenge his driver's license revocation. At the revocation hearing, an unidentified member of the public appeared at the ADLRO and asked to attend the Freitas hearing. In response, an ADLRO staff member told the woman she would have to present identification and sign in on a roster at the reception desk. She refused, saying it would be an invasion of privacy, but she offered instead to be searched. Her offer was declined, and she was not permitted to attend the hearing.

The ADLRO sign-in and identification procedure (sign-in procedure) was adopted on May 1, 2001, as a general policy, purportedly to promote security. No other security precautions are taken at the ADLRO. Persons entering the ADLRO are not subject to any kind of search or inspection, nor screened by any sort of metal-detecting device. Frequently, outside the hearing rooms, uniformed Honolulu police officers are waiting to testify.

¹ The office lies within the Judiciary of the State of Hawaii pursuant to Haw.Rev.Stat. Chapter 291E, Part III (2004 Supp.), to implement state laws for the revocation of drivers' licenses for those persons arrested for operating a motor vehicle while under the influence of intoxicants. The ADLRO was created by enactment of Haw.Rev.Stat. Chapter 286, Part XIV (1991 Supp.) and in 2000 was reenacted as Haw.Rev.Stat. Chapter 291E, Part III (2001 Supp.).

When the administrative hearing began, Freitas requested an evidentiary hearing to challenge the sign-in procedure as a violation of his right to due process under the Fourteenth Amendment. After his request was denied, the revocation of his driver's license was upheld. Freitas petitioned for judicial review by the state district court, which upheld the revocation without opinion. He then appealed to the Supreme Court of Hawaii.

Holding that revocation hearings at the ADLRO are public hearings and that Freitas had a right to a hearing on the validity of the sign-in procedure, the Supreme Court of Hawaii temporarily remanded directly to the ADLRO to decide if the procedure violated his due process right to a public hearing. *Freitas v. Administrative Director*, 104 Haw. 483, 484, 489, 92 P.3d 993, 994, 999 (2004) (*Freitas I*). In particular, the court directed the ADLRO to decide whether the sign-in procedure "serve[s] an important government interest"; whether the interest served is "unrelated to the content . . . of the proceeding"; and whether a "less restrictive way to meet that goal" exists. *Freitas I*, 104 Haw. at 489, 92 P.3d at 999 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Of these, the least-restrictive-means prong of the *O'Brien* test was, and still is, the only issue.

Just before the hearing on remand at the ADLRO, two members of the public attempted to attend the hearing, but they, too, were refused entry for being unwilling to comply with the sign-in procedure, although they were willing to be searched. When the hearing began, witnesses testified for both sides. The head of the ADLRO testified that he had instituted the sign-in procedure as a means of identifying any member of the public who created a disturbance to help the police make an arrest afterwards.

He conceded, however, that no member of the public has ever caused a disruption at the ADLRO since it was created in 1991. He also testified that he had never requested an appropriation for standard security equipment such as metal detectors, hand-held or otherwise, which he said were expensive, but no evidence was offered as to actual costs. Further, he testified that when the ADLRO has needed security, a deputy sheriff has always been made available. Finally, he testified that the ADLRO staff had no training in detecting fake identification.

Two security experts testified. Appearing for Freitas was the retired Honolulu Chief of Police, who testified that fake identification is easy to obtain. To summarize his evaluation of the sign-in procedure, he said: "[It's] not absolutely useless [but] close to it." Even the attorney general investigator who appeared as the security expert for the ADLRO testified that the procedure is "relatively useless." In addition, it was established that at no public hearing in any court in the State of Hawaii is any sort of sign-in and identification procedure utilized in lieu of standard security screening. Finally, the record included a security assessment prepared in May 2001 by the Hawaii Department of Public Safety, in response to an ADLRO request for an evaluation of security at its hearings. In the assessment, security problems were noted, but the actions recommended did not include a sign-in and identification procedure.

After the hearing, the hearing officer entered findings, ultimately concluding that the ADLRO sign-in procedure does not infringe on a respondent's right to a public hearing. When the case returned to the Supreme Court of Hawaii, a majority of the court in a published opinion held, as to the third prong of the *O'Brien* test, that "there

is no less restrictive way [than the present sign-in procedure] to meet the goal of securing ADLRO hearings." *Freitas II*, 108 Haw. at 37, 116 P.3d at 679.

The hearing officer's actual conclusion on this point was as follows:

3. There is no less restrictive way to fully serve this important governmental interest in *enhancing security* and *avoiding disruptions* at ADLRO administrative hearings and in-office area, other than to continue with the ID procedure. Although other measures can add to security as well, *there is no other less intrusive means of achieving the unique deterrent effect that arises out of depriving a person of his or her anonymity*. The ADLRO ID procedure is the least intrusive means of achieving this unique deterrent effect.

Freitas II, 108 Haw. at 36, 116 P.3d at 678 (also quoted in *id.* at 56, 116 P.3d at 698 (Acoba, J., dissenting)) (emphasis added).

REASONS FOR GRANTING THE PETITION

- I. This Court should resolve the split created by the Supreme Court of Hawaii with the Supreme Court of Indiana and two courts of appeals as to whether public access to adjudicative hearings may be restricted by a sign-in procedure (in lieu of security screening), with no requirement that it be justified by case-specific findings?

A. The Right of Public Access to Adjudicative Proceedings

The public's right of access to court proceedings is well-established. *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Nixon v. Warner Communications*, 435 U.S. 589 (1978). A public tribunal is fundamental to our system of justice. *In re Oliver*, 333 U.S. 257 (1948) ("It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."). Public scrutiny of the court system serves to (1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). In *Press Enterprise*, this Court explained how both fairness and public confidence are enhanced by open trials:

The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are

being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

464 U.S. at 508. Although its original inception was in the realm of criminal proceedings, the right of access now extends to civil proceedings where openness is just as valuable. *Smith v. United States District Court*, 956 F.2d 647, 650 (7th Cir.1992). In 1980, a concurring opinion from this Court noted that civil proceedings, which may inflict greater costs upon third parties, will be well served by better and closer public scrutiny. *Richmond Newspapers*, 448 U.S. at 596 (Brennan, J., concurring).

Originally justified by common-law traditions that predate the Constitution, the right of access belonging to the press and the general public also lies in the First Amendment. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). The First Amendment presumes a right of access to proceedings that historically were open to the public because of the public's significant role in the proper functioning of the judicial system. *Press Enterprise*, 464 U.S. at 508-09. But because neither the constitutional nor the common-law right is absolute, the presumption of right of access may be rebutted in an exceptional case upon demonstration that exclusion of the public "is essential to preserve higher values and is narrowly tailored to serve that interest." *Press Enterprise*, 464 U.S. at 510.

This Court's public-access cases cited above arose in the context of the First Amendment right of the media and the public and/or the Sixth Amendment right of the criminal defendant. In the instant case, the Supreme